IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

CHICOT COUNTY DRAINAGE DISTRICT ..... *Petitioner*

v. No. 122

THE BAXTER STATE BANK AND
MRS. LENA S. SHIELDS ..... *Respondents*

BRIEF FOR RESPONDENTS

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INDEX

TABLE OF CASES CITED

TEXTS CITED

OPINIONS CITED

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BRIEF FOR RESPONDENTS

Respondents will present their contention under three heads:

1. The provisions of an unconstitutional act may be disregarded.
2. The first Municipal Bankruptcy Act was declared unconstitutional and the decision has not been overruled or modified.
3. Did the unconstitutional act give the court jurisdiction either of the subject matter or the parties?

THE PROVISIONS OF AN UNCONSTITUTIONAL ACT MAY BE DISREGARDED

This case was decided by the United States Circuit Court of Appeals, Eighth Circuit, on April 29, 1939. From the opinion of that Court we quote the second paragraph, which reflects the facts:

"The bankruptcy proceedings referred to were initiated on June 17, 1935, by filing in the United States District Court for the Eastern District of Arkansas, a petition for authority to effect a plan of debt readjustment, pursuant to amendments to the Bankruptcy Act, adopted May 24, 1934, and designated as U. S. C. A. Title 14, Sections 301, 302 and 303. No question is raised as to the regularity of these proceedings as prescribed by the Act. Plaintiffs were made parties to said proceedings by publication of a notice thereof pursuant to order of the bankruptcy court, and by mailing to them personally a notice of said proceedings, which notice was received by each of them, but neither of them appeared therein either in person or by attorney."

In addition to these facts, it is noted that the final decree in the original action in the District Court in Bankruptcy was entered March 28, 1936 (R. 49). The decision in *Ashton* v. *Cameron County Water Improvement District*, 298 U. S. 513, declaring unconstitutional the Act of Congress upon which the action was based, was rendered May 25, 1936.

This final decree provides (R. 52) that all obligations against the District must be presented within one year from the date of the decree. That is, they should be presented not later than March 28, 1937.

This decree provides also that all outstanding bonds on the final date fixed were "cancelled, annulled and held for naught as enforceable obligations of the petitioning district," (R. 52) "and that the holders thereof be and they are hereby forever restrained and enjoined from otherwise asserting any claim or demand whatsoever therefor as against the petitioning district or its officers, or

against the property situated therein or the owners thereof." (R. 52).

If this decree is upheld, respondents are guilty of contempt of court in bringing the present action in violation of this injunction. While respondents may have some contempt for an unconstitutional act, they have none for the court, and have no fear for citation for violation of the terms of a decree based upon an act, declared to be unconstitutional before that decree became finally consummated.

The only question before this Court is, May the respondents be forced to surrender the bonds of the Drainage District held by them for an amount less than that provided in the Contract?

All the authorities cited by petitioner in an attempted support of its theory that the decision of the District Court before the act was declared unconstitutional may be res judicata as to this suit are based on facts different from those involved in the instant case.

In the instant case the constitutionality of the act of Congress, referred to as the first Municipal Bankruptcy Act, was not raised. These respondents were not in court either in person or by attorney. It is true they were served as provided by said act, but it is also true that such service, based on an unconstitutional act, was a mere nullity. Both the District Court and the Court of Appeals held the act, being unconstitutional, was void and no action could be taken thereon depriving these respondents of their contractual rights.

Sustaining its conclusions, the Court of Appeals cites many decisions of this Court and we see no occasion to make further reference to them as there is no effort on the part of petitioner to discuss these cases. No contention is made that they do not sustain the conclusions reached by the Court of Appeals. However, for this Court's convenience, we set them out as follows:

McDonald v. *Mabee*, 243 U. S. 90;

Chicago, I. & L. R. Co. v. *Hackett*, 228 U. S. 559;

Norton v. *Shelby Co.*, 118 U. S. 425;

Security Savings Bank v. *Connell* (Ia.) 200 N. W. 8;

Servonitz v. *State* (Wis.) 113 N. W. 277;

Black on Judgments, Sec. 216.

To these we add the following:

Freeman on Judgments (5th Ed.) Vol. 1, p. 733;

Metzger Motor Car Co. v. *Parrott*, 233 U. S. 36;

American Jurisprudence, Vol. 11

And we quote from the subject of *Constitutional Law*, 11 *American Jurisprudence, sub-head*, "Effect of Unconstitutional Statutes," Section 148:

> "The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted. Moreover, a construction of a statute which brings it in conflict with the Constitution will nullify it as effectually as if it had, in express terms, been enacted in conflict therewith.
>
> "Since an unconstitutional law is void, the general principles follow that it imposes no duties, con-

fers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it. No one is bound to obey an unconstitutional law and no courts are bound to enforce it because only the valid legislative intent becomes the law to be enforced by the courts.

"A void act cannot be legally inconsistent with a valid one. Moreover, an unconstitutional law cannot operate to supersede any existing valid law. Accordingly, where a clause repealing a prior law is inserted in an act, which act is unconstitutional and void, the provisions for the repeal of the prior law will usually fall with it and will not be permitted to operate as repealing such prior law. A judgment of any court which is based on an unconstitutional law—it has been said—has no legitimate basis at all and is not to be treated as a judgment of a competent tribunal. Furthermore, courts of other states are not required to give to it the full faith and credit commanded by the provisions of the United States Constitution as to the public acts, records and judicial proceedings of other states.

"A contract which rests on an unconstitutional statute is void and creates no obligation to be impaired by subsequent legislation.

"These general principles apply to the Constitutions as well as to the laws of the several states in so far as they are repugnant to the Constitution and laws of the United States."

Among the numerous citations given in support of the above statement of the law are more than twenty from this Court.

Petitioner contends that the case culminating in the decree of March 28, 1936, was between the same parties and involved the same issues as presented in the case at bar. Respondents contend that steps taken under an un-

constitutional act are void and especially is this true as to one who was not in court nor represented.

Petitioner contends also that the decree of the District Court is not "wholly void" but does not set out to just what extent or degree it is void. A decree, based upon an unconstitutional act, may not be partly void and partly valid. If it were void, it was void—this does not permit of degrees.

If the question of jurisdiction is one of law, the court cannot acquire it; if one of fact, its findings would be effective. 15 C.J. 854. Petitioner cites *Ashton* v. *Cameron County Water Improvement District*, 298 U. S. 513, holding the first Municipal Bankruptcy Act unconstitutional, and *Lindsay-Strathmore Irrigation District* v. *Bekins, et al*, 304 U. S. 27, holding the second Municipal Bankruptcy Act constitutional, then suggests that the method of service in the original act being the same as in the second act, these respondents were in court under the original service. This is rather a strange contention. Under the Ashton case, *supra*, the first act was held unconstitutional because, by its terms, it included political divisions of states. The Ashton case was based on a Water Improvement District, just as the instant case is one on a Drainage Improvement District. Neither of them is a political subdivision of the state in its strict sense, but there is no difference in the status.

It is not what may have been done under the act but the power given that is the test of its constitutionality.

It is contended by petitioner there is no material difference between the first and the second acts. There is a

very substantial difference in that from the second there were omitted all those provisions rendering the first act unconstitutional.

Rule In Arkansas

In the case of *Rankin* v. *Schofield*, 81 Ark. 463, the court quotes approvingly from *Freeman on Judgments* as follows:

> "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all acts flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers."

and cites also *Townsley-Myrick Dry Goods Co.* v. *Fuller*, 58 Ark. 186.

In *Pitcock* v. *State*, 91 Ark. 534, the court again quotes approvingly from *Freeman on Judgments*, as above, cites also *Rankin* v. *Schofield*, 81 Ark. 463, and goes on to say:

> "On the other hand, a court possesses the power of hearing and determining the question of its jurisdiction, and may, while so doing, require the parties to preserve the status of the subject-matter. *United States* v. *Arredondo*, 6 Pet. 709; *United States* v. *Shipp*, 203 U. S. 563. However, when the pleadings show on their face that the court is wholly without jurisdiction of the subject-matter set forth therein, any preliminary order made or final judgment rendered is void. *Williford* v. *State*, 43 Ark. 62."

Petitioner based its original action on the first Municipal Bankruptcy Act, May 21, 1934 (R. 17) subsequently declared unconstitutional. This petition on its face reflected a lack of jurisdiction.

The decisions of the Arkansas Supreme Court are controlling. *Erie Ry. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188.

2

THE FIRST MUNICIPAL BANKRUPTCY ACT WAS DECLARED UNCONSTITUTIONAL AND THAT DECISION HAS NOT BEEN OVERRULED NOR MODIFIED

This case was tried both in the District Court and in the Circuit Court of Appeals on the theory that the First Municipal Bankruptcy Act was unconstitutional. For the first time petitioner now raises the question of the constitutionality of the act in the State of Arkansas in its petition for certiorari, citing the case of *Drainage District No. 7 of Poinsett County* v. *Hutchins*, 184 Ark. 521, holding that a drainage district is not such a political subdivision of the state and might be made a defendant in its courts. It is argued then that if the Ashton case had arisen in Arkansas, on appeal it would have been held constitutional.

The Constitution of the United States is a limitation upon Congress. When the Supreme Court of the United States holds an act unconstitutional it applies to all states alike. Under petitioner's theory it would seem that before such a question could be finally settled as to local effect appeals would be necessary from each state.

A drainage district in Arkansas has the same status as a water improvement district in Texas. This Court did not hold the first Municipal Bankruptcy Act unconstitutional because the water improvement district of

Texas was a subdivision of the government but because the original act provided that political subdivisions of the states might be adjudged bankrupts.

As stated in the opinion in the Ashton case, *supra*, the test of constitutionality is not what has been done under an act but what may be done—the power that is given under the act.

We emphasize the fact that the decision of this Court in *Lindsay-Strathmore Irrigation District* v. *Bekins*, et al, 304 U. S. 27, holding the second Municipal Bankruptcy Act constitutional, in no way overrules or modifies the decision in the Ashton case, *supra*, but bases its conclusions upon amendments made by Congress eliminating political subdivisions of the state.

3

DID THE UNCONSTITUTIONAL ACT GIVE THE COURT JURISDICTION EITHER OF THE SUBJECT MATTER OR THE PARTIES

It is contended by petitioner that the court had jurisdiction of the subject matter because it has general jurisdiction in matters of bankruptcy, but this unconstitutional act contained the following provision:

> "Until January 1, 1940, in *addition* (italics ours) to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in this chapter of this title."

The additional jurisdiction attempted to be extended rendered the act unconstitutional. The court having juris-

diction generally of bankruptcy could not exercise the additional jurisdiction extended in that act.

A defendant might respond to a summons under an unconstitutional act, raise the question of constitutionality and then it might become incumbent upon him to appeal from an adverse ruling, but we emphasize the fact that in the instant case the respondents were never in court either in person or by attorney. Even if they had been, an appeal would have been vain and unnecessary as the act upon which the proceeding in the District Court was based was declared unconstitutional before the decree of that Court became fully effective and before the time for appeal had expired, final decree having been entered March 28, 1936 (R. 49).

We respectfully submit that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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